STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND
THE WORKERS' COMPENSATION APPELLATE COMMISSION

E. W. RAKESTRAW,

Plaintiff-Appellee,

vs

GENERAL DYNAMICS LAND SYSTEMS,

Defendant-Appellant.

Supreme Court:
120996

Court of Appeals:
237610

Lower Court: WCAC
Docket No: 010170

BRIEF OF *AMICUS CURIAE* MICHIGAN TRIAL LAWYERS ASSOCIATION

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DOES MICHIGAN LAW MAKE NO DISTINCTION BETWEEN SYMPTOMATIC AND PATHOLOGICAL CONSEQUENCES OF AN INJURY, FINDING COMPENSABILITY WHERE SUCH EFFECTS ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT AND LIMIT THE INJURED EMPLOYEE'S WAGE-EARNING CAPACITY?

Amicus curiae MTLA answers "YES."
Plaintiff-Appellee answers "YES."
Defendant-Appellant answers "NO."
The WCAC answered "YES."
The Court of Appeals did not answer.

STATE OF MICHIGAN

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ON APPEAL FROM THE COURT OF APPEALS AND THE WORKERS' COMPENSATION APPELLATE COMMISSION

E. W. RAKESTRAW,	**Supreme Court: 120996**
Plaintiff-Appellee,	
vs	**Court of Appeals: 237610**
GENERAL DYNAMICS LAND SYSTEMS,	**Lower Court: WCAC Docket No: 010170**
Defendant-Appellant.	

STATEMENT OF INTEREST

MICHIGAN TRIAL LAWYERS ASSOCIATION ["MTLA"] is a state-wide bar association. The membership of MTLA primarily represents victims of injuries, including those who suffer injuries in the work place. MTLA seeks permission to file its brief *amicus curiae* because this Court's consideration of the issue of the compensability of work-related symptomatic aggravations of nonwork-related, preexisting conditions will have a significant and far-reaching impact upon the clients of its membership. Additionally, MTLA believes that it can help this Court arrive at an appropriate and just interpretation to be applied in these cases and others like them.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Amicus MTLA adopts the Statement of Material Facts and Proceedings contained in the brief filed by plaintiff in this matter.

ARGUMENT

MICHIGAN LAW MAKES NO DISTINCTION BETWEEN SYMPTOMATIC AND PATHOLOGICAL CONSEQUENCES OF AN INJURY, FINDING COMPENSABILITY WHERE SUCH EFFECTS ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT AND LIMIT THE INJURED EMPLOYEE'S WAGE-EARNING CAPACITY.

Standard of Review. This Court reviews issues of statutory construction *de novo*, as a question of law. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Pursuant to §301(1) of the Workers' Disability Compensation Act ["WDCA"], coverage is extended to "a personal injury arising out of and in the course of employment":

> "An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of injury, shall be paid compensation as provided in this act." MCL 418.301(1).

Furthermore, a limitation of a claimant's wage-earning capacity resulting from such a personal injury is compensable:

> "As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss." MCL 418.301(4).

Finally, an employee who "receives" a personal injury is entitled to coverage of his or her medical expenses:

> "The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed." MCL 418.315(1).

These are the key operative provisions of the WDCA, each involving the concept of a "personal injury."

None of these statutes expressly defines "personal injury." However, as demonstrated, to be fully compensable, the personal injury must arise out of and in the course of employment, and limit the employee's post-injury wage-earning capacity. Defendant attempts to impose an additional requirement – that the personal injury involve actual pathological damage to the body. In other words, defendant would have this Court exclude any claim where work aggravated only the symptoms of a preexisting or underlying condition, but did not also create additional damage to the pathology of the condition. This requirement appears nowhere in the WDCA, nor does its insertion make logical sense or serve any purpose of the WDCA.

The phrase "personal injury" has long been interpreted by this Court to encompass not merely injuries *per se*, but also an employment-related "injurious result":

> "The statute, 2 Comp. Laws 1929, § 8417, provides compensation for a personal injury, arising out of and in the course of employment. Personal injury implies something more than changes in the human system incident to the general process of nature or existing disease or weakened physical condition. The term, as employed in the compensation act, contemplates some intervention which either produces a direct injury or so operates upon an existing physical condition as to cause an injurious result, reasonably traceable thereto." *Marman* v *Detroit Edison Co*, 268 Mich 166, 167; 255 NW 750 (1934).

This interpretation is the only sensible and workable way to construe the language of §301(1), so that it provides the coverage intended by the Legislature.

If work creates an "injurious result," either by virtue of the occurrence of an acute injury or by employment's effect on a preexisting condition, the injury has arisen out of and in the course of employment. MCL 418.301(1). If it further limits the injured employee's capacity to earn wages in work suitable to his or her qualifications and training, it is compensable. This is disability, by definition. MCL 418.301(4).

In the latter respect, it makes no difference how work caused the employee's disability, as long as it *did* cause it. Whether the employment creates the underlying

condition, aggravates a preexisting condition, or simply renders that preexisting condition symptomatic, the result is the same -- the employee is left unable to work because of his or her job. Where the result is the same, the treatment of each should also be the same. The Court of Appeals has recognized that fact, characterizing the differentiation between symptomatic and pathological aggravations as "a distinction without a difference":

> "Awarding or withholding benefits on the basis of whether pain is a symptomatic manifestation of a preexisting condition rather than an aggravation of a preexisting condition is a distinction without a difference." *Cox* v *Schreiber Corp*, 188 Mich App 252, 258-259; 469 NW2d 30 (1991).

This is the only reasonable way to view the subject.

In that regard, it should be recognized that it is not the injury *per se* that is disabling, but instead the symptoms it produces. An injured employee does not stop working because of a ruptured disc; he stops working because of the pain the rupture causes. An employee does not leave the job because she has emphysema; she leaves because she has shortness of breath. Similarly, injured employees seek treatment or undergo treatment because they cannot bear the symptoms of their condition. It is the symptoms that effectively trigger everything. To suggest that they are legally irrelevant makes absolutely no sense. If symptoms leave an employee unable to work, why is that not an injury?

However, It is not enough that pain renders an employee unable to work, *unless the employment caused the pain*. By contrast, pain caused by the natural progression of the underlying disorder would *not* be compensable, because this pain did not result from the claimant's employment. Nor would a claimant receive benefits if the underlying condition would cause pain if he or she did work, creating a situation where it would be medically inadvisable to return to the job.

Michigan law has long recognized this simple distinction, awarding benefits where an employee's job caused him or her to experience the disabling symptoms of a preexisting condition, but limiting compensation to the period during which the work-caused pain

continued. The keystone is a work-related element to the symptoms, without which no compensation is payable. This is the requisite personal injury arising out of and in the course of employment, which results in the limitation of the injured employee's wage-earning capacity.

This Court drew such a distinction in *Kostamo* v *Marquette Iron Mining Co*, 405 Mich 105, 116; 274 NW2d 411 (1979), in which it wrote:

> "The workers' compensation law does not provide compensation for a person afflicted by an illness or disease not caused or aggravated by his work or working conditions. Nor is a different result required because debility has progressed to the point where the worker cannot work without pain or injury. Accordingly, compensation cannot be awarded because the worker may suffer heart damage which would be work-related if he continued to work. Unless the work has accelerated or aggravated the illness, disease or deterioration and, thus, contributed to it, or the work, coupled with the illness, disease or deterioration, in fact causes an injury, compensation is not payable."

The *Kostamo* Court recognized two roads to compensability in light of a preexisting condition -- where "the work has accelerated or aggravated the illness, disease or deterioration," *and* where "the work, coupled with the illness, disease or deterioration, in fact causes an injury..." *Id*. Certainly, work *has* coupled with an illness, disease, or deterioration, where it has caused that underlying disorder to produce disabling symptoms. This is the "injurious result" referred to many years ago in *Marman, supra*.[1]

If an employee cannot work because a preexisting condition would cause him to experience pain, he is not entitled to benefits. There is no work connection. If an injured employee is experiencing pain, but it is due to the natural progression of her underlying condition and not her employment, she is not entitled to benefits. Work has not contributed to the situation. However, if an employee with a preexisting condition experiences enhanced symptomatology as the result of work's impact upon that condition, he or she is

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[1]Some unfortunate reasoning in *Kostamo* has led to conflicting interpretations. This situation shall be dealt with in more detail below.

entitled to benefits for the duration of the enhanced symptoms. During that period, it is the job that has rendered the condition disabling. When work no longer plays such a role, the claim is no longer compensable.

This same balance was applied in *Carter v General Motors Corp*, 361 Mich 577; 106 NW2d 105 (1960). In *Carter*, this Court granted a "closed" award of benefits, an award for a limited period rather than an ongoing "open" award, to an employee whose preexisting paranoid schizophrenia was aggravated by his work on the assembly line, causing symptoms of psychosis to arise. However, once the acute symptoms caused by the job subsided, the claimant was entitled to no more benefits because the limitations on his wage-earning capacity were the same as before any employment injury:

> "If there were testimony that claimant's inability to work on a production line was caused by the paranoid schizophrenia condition for which we have held he is entitled to compensation benefits, he would be entitled to continuing payment of such benefits. However, Dr. Tourkow testified that as of September 11, 1957, Mr. Carter no longer showed any symptoms of paranoid schizophrenia or other psychosis. He testified that Mr. Carter should not be employed again in production work, not because of his paranoid schizophrenia, but for the same reason he should not have been employed in such work in the first place: Mr. Carter has a personality configuration that makes him more susceptible than others to psychotic breakdowns when subjected to pressures such as are encountered in production line employment. Under the circumstances, we find no evidence to support the appeal board's award continuing compensation benefits beyond September 11, 1957." *Carter, supra*, at 594.

Again, the Court drew the line in the appropriate place. Mr. Carter's work on the assembly line aggravated his underlying paranoid schizophrenia, causing it to become temporarily symptomatic. During the duration of the job-caused symptoms, the resulting disability was compensable. Once work's effects had abated, no further benefits were payable, even though the preexisting condition still existed.

This same balance was again applied by the Court of Appeals in *Thomas* v *Chrysler Corp*, 164 Mich App 549, 555; 418 NW2d 96, lv den 429 Mich 881 (1987), in which that Court distinguished between compensable and noncompensable symptoms-based claims[2]:

> "Although the WCAB determined that plaintiff was not entitled to compensation notwithstanding the medical inadvisability of returning to work, it did not apply improper legal standards, for the question whether it was medically advisable for plaintiff to return to work is not relevant until it is established that the disability was caused or advanced by the work. That it is inadvisable for plaintiff to return to work at Chrysler does not entitle him to benefits unless he has suffered a compensable injury. *Kostamo* v *Marquette Iron Mining Co*, 405 Mich 105, 116; 274 NW2d 411 (1979)."

In *Thomas*, the claimant suffered from preexisting dermatitis, which broke out upon his exposure to contaminants in his employment environment. The Court held that his claim was compensable during the period of active eruptions, but was no longer compensable once the eruptions subsided. At that point, it was still inadvisable that the claimant work in such an environment, but this limitation was no longer the result of work's effects; it was wholly the result of the underlying, preexisting condition.

However, *Thomas* introduces a corollary to the formula: If work caused the condition that renders a return to work medically inadvisable, that condition will remain work-related even after the symptoms subside. In that instance, the job's effects would continue beyond the date of active symptoms, since they would continue to preclude employment in the same type of environment.[3]

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[2]Defendant contends that *Thomas* is not a true "symptoms-only" case: "...the case of *Thomas, supra*, actually involved an employee with medically identifiable damage separate from an existing injury or illness." Defendant's Brief, at 33. However, the *Thomas* Court expressly found otherwise: "The WCAB found that plaintiff had not met his burden of proving that his employment caused or aggravated his underlying condition; that at most it caused an exacerbation of symptomatology." *Thomas, supra*, at 556. Defendant's analysis is misleading.

[3]The claimant might not be compensably disabled, if he is still capable of earning the same amount of money in other employment environments. *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).

A further gloss on the doctrine arose in *McDonald* v *Meijer, Inc*, 188 Mich App 210; 469 NW2d 27, lv den 439 Mich 898 (1991). In that case, the plaintiff suffered from preexisting "hemophiliac arthritis," and the Court found only a symptomatic aggravation of that condition by a work incident.[4] Where the enhanced symptoms had not abated by the time of the hearing, the Court held that the finder of fact had no alternative but to grant an open award. However, it was careful to balance that ruling with a further holding that the defendant could later return to seek a finding that work's effects had subsided, and that the condition was no longer compensable:

> "Here, plaintiff's increased symptoms had not abated by the date of the administrative hearing. Benefits through that date, September 20, 1984 were therefore ordered. Defendant may, however, at any time petition the bureau to discontinue compensation. Upon such a petition, defendant must show that the increased symptoms have abated or are no longer work related." *Id*, at 216.

Again, the Court granted benefits for a work-caused aggravation of the symptoms of a preexisting condition, but specifically held that the award would be limited to the period of the work-related symptoms. Once they had subsided, the presence of the underlying, nonwork-related condition would not be enough to satisfy the statute. At that point, the "personal injury arising out of and in the course of employment" will have abated.

A good example of the proper workings of the Michigan statute may be viewed in *Siders* v *Gilco Inc*, 189 Mich App 670; 473 NW2d 802 (1991). In *Siders*, the claimant suffered from congenital scoliosis, which had required the surgical insertion of a rod in his back. His work duties aggravated the symptoms of that condition for a time:

> "Before his surgery, plaintiff experienced significant pain, which he attributed to his employment. Plaintiff's pain would intensify when he worked, and subside when he rested. The appeal

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[4]Again, defendant's insistence that *McDonald* is not a "symptoms-only" case is contrary to the Court's own finding: "The next issue confronting us is whether the WCAB properly found a disability within the meaning of MCL 418.401; MSA 17.237(401), *based solely on the finding of increased symptoms*." *McDonald, supra*, at 215 (emphasis supplied).

> board found plaintiff's employment increased the symptoms resulting from his nonwork-related congenital condition, and thus found him entitled to a closed award of benefits for the period during which his symptoms increased. Plaintiff was awarded a closed benefit award from October 24, 1979, until October 17, 1980, at which time he was released to return to restricted work." *Siders*, *supra*, at 672.

Benefits were awarded for this period.

However, even though the plaintiff still had restrictions for the period after October 17, 1980, the Court noted that these restrictions were the result of the underlying condition and surgery, and no longer the employment:

> "However, the appeal board's opinion indicates the work restrictions were attributable to the surgery and underlying congenital condition and not to any work-related symptoms that had increased plaintiff's pain before the surgery." *Id.*

Because this impairment of plaintiff's wage earning capacity was not the result of his employment, no further benefits were awarded.

This is a perfect example of how things *should* work. The claimant in *Siders* suffered a diminishment of his wage earning capacity as the result of his performance of the duties of his employment, and was compensated accordingly. However, as soon as the effects of his employment had abated, and the sole reason for the diminished capacity was the underlying condition, benefits were halted. In this fashion, the employer was not required to pay beyond the period during which his employment played a role in his disability.

Any other rule would undercut, if not totally destroy, another long-standing maxim in workers' compensation law -- that an employer takes its employees as it finds them. The *Kostamo* Court recognized the efficacy of this precept:

> "The problem of pre-existing disease or condition was addressed in an earlier case: 'Nothing is better settled in compensation law than that the act takes the workmen as they arrive at the plant gate. Some are weak and some are strong. Some, particularly as age advances, have a preexisting "disease or condition" and some have not. No matter. All must work. They share equally the hazards of the press and their families the stringencies of want, and they all, in our opinion, share equally in the protection of the act in event of accident, regardless of

> their prior condition of health.' *Sheppard v Michigan National Bank,* 348 Mich 577, 584; 83 NW2d 614 (1957)." *Kostamo, supra*, at 126, n 8.

More recently, this Court affirmed the ongoing force of this doctrine in *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 747-748; 641 NW2d 567 (2002): "For example, it is well established that employers take employees as they find them, with all preexisting mental and physical frailties."

An employer will not be taking an employee as he enters the factory gate, if it is excused from payment for aggravation of the symptoms of a preexisting mental or physical frailty. Nor would an individual with a preexisting condition that is aggravated only symptomatically by her employment "share equally in the protection of the act" with an able-bodied worker who suffers an injury on the job. Although both would be unable to return to work because of problems created by the job, only the latter would find protection under the Act. This is clearly an inequitable result, with no basis in logic or the law. Instead, if work causes a disability, whether it be by an injury or by an "injurious result" such as the symptomatic aggravation of a preexisting condition, compensation should be payable.

This has been the approach taken by other states as well. For example, the Pennsylvania workers' compensation system utilizes a standard quite similar to that applicable in Michigan:

> "The statutory elements of compensability are an injury by accident, arising out of and in the course of employment. *See* ARS § 23-1021(A). This standard applies despite a pre-existing condition; the employer takes the employee as he or she is. *E.g., Division of Vocational Rehabilitation v Industrial Commission*, 125 Ariz 585; 611 P2d 938 (App 1980). A claim is compensable if work activity combines with a pre-existing condition to cause a further injurious result. *Professional Furniture Service v Industrial Commission*, 133 Ariz 206; 650 P2d 508 (App 1982)." *Mandex, Inc v Industrial Comm'n of Arizona*, 151 Ariz 567; 729 P2d 921, 923 (1986).

The parallels with the Michigan standard are unmistakable.

The Pennsylvania Court of Appeals applied this standard to find that the aggravation of a preexisting condition was compensable, even if it represented merely the exacerbation of the symptoms of that condition:

> "We conclude that there is a compensable claim for work-related exacerbation of symptoms that themselves require medical treatment. *Cf. Tarpy v Industrial Commission*, 138 Ariz 395; 675 P2d 282 (App 1983) (reopening for increased pain that requires medical treatment, despite no increase of disability). Because of the underlying condition, claimant was disabled from typing but was able to perform the functions of an office manager. The exacerbation of symptoms increased her disability to the point that she was not even able to perform the day-to-day functions of an office manager and was forced to terminate her employment. This increased disability is also a consequence of her injury. *Industrial Indemnity, supra* 152 Ariz at 200; 731 P2d at 95; *cf. Montgomery Ward Co v Industrial Commission*, 14 Ariz App 21; 480 P2d 358 (1971) (to establish compensable claim, employee must prove that the disability was greater than it would have been without the work contribution)." *Mandex, Inc, supra*, 729 P2d at 924.

The same sort of reasoning should apply here. If increased symptoms in turn increased the plaintiff's disability, this added disability was a compensable consequence of the injury.

Similarly, in *Gower v Conrad*, 146 Ohio App 3d 200; 765 NE 2d 905, 908 (2001), the Ohio Court of Appeals held that a compensable aggravation could consist of either symptoms or physiological changes, as long as they had an impact on the claimant's bodily functions or affected his or her ability to work:

> "First, appellant's proposed instruction is a correct statement of Ohio law. An aggravation claim refers to a situation when a preexisting condition becomes worse due to a workplace injury and is compensable under the workers' compensation system. See, generally, *Schell [v Globe Trucking, Inc*, 48 Ohio St. 3d 1; 548 NE2d 920 (1990)]. 'The key is whether the aggravation * * * had an impact on a person's bodily functions or affected an individual's ability to function or work.' *Boroff v McDonald's Restaurants of Ohio, Inc* (1988), 46 Ohio App 3d 178, 181; 546 NE2d 457. Significantly, 'an aggravation of the underlying condition can be evinced through either symptoms ("debilitating effects") or physiological changes not due to the normal progression of the disease.' *Hess v United Ins Co of Am* (1991), 74 Ohio App 3d 667, 679; 600 NE2d 285. Thus, a jury may find an aggravation through evidence of worsened symptoms even though objective

> medical testing does not otherwise indicate a worsening condition. *Id.* See, also, *Rumer v Neuman Industries, Inc* (June 17, 1997), Allen App No 1-96-92, unreported, 1997 WL 346192 ('Increased pain, along with an inability to work due to that pain, may be considered an "aggravation" of a pre-existing disorder, if the claimant's symptoms are supported by the evidence in the record.')"

This analysis is completely consistent with that of Michigan.

In Louisiana, the Court of Appeals has also held that the aggravation of the latent symptoms of a nonwork condition constitutes a compensable personal injury:

> "...we next address whether defendant should be liable for the aggravation of claimant's pre-existing shoulder injuries whose latent symptoms reappeared as a consequence of claimant's affiliation with his employer. Because claimant's medical expenses arising from his shoulder injuries are related to an accident which occurred while he was employed by defendant, we conclude that they are..." *Elliot v OMSI*, 693 So 2d 847, 849 (La App, 1997).

Again, this reasoning is consistent with the standard Michigan has applied.

None of these states draw a distinction between increased symptoms or physiological damage. Instead, all recognize, as does Michigan, that the net effect of both is the same – a decrease in the injured employee's ability to work as a consequence of a job-related injury. Given the similarity of standards and the same reasoning traditionally applied by Michigan Courts, the same result is appropriate in the instant case.

Defendant, however, has argued to the contrary, based upon an overly detailed, yet misleadingly selective, analysis of the first sentence of MCL 418.301(1): "An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of injury, shall be paid compensation as provided in this act." In particular, defendant focuses upon the two words "personal" and "injury." However, its handling of these words is inconsistent with its own reasoning.

For example, defendant defines "injury" as synonymous with "harm" or "damage."[5] However, after acknowledging as much, defendant simply drops any further reference to "harm," defining "injury" by using only half the definition it itself propounded. "Injury" can be *either*, and *amicus* MTLA submits that "harm" includes pain or any other symptom of an underlying disease or disorder.

Furthermore, Webster's actually defines "injury" more broadly than defendant recognizes:

> "**1 a:** an act that damages *or hurts* : WRONG **b:** violation of another's rights for which the law allows an action to recover damages **2** : *hurt*, damage, or loss sustained." Merriam-Webster's Collegiate Dictionary (10th Ed, 1993), at 602 (emphasis supplied).[6]

Not only is an act that damages an "injury," but so is an act that "hurts" – *i.e.*, one that causes pain, *a symptom*. Defendant's entire argument, based as it is upon the plain language definition of "injury," is mispremised from the onset.

Defendant further twists the simple meaning of the phrase "personal injury" by its analysis of the role the word "personal" plays in that phrase. Defendant defines "personal" as "of or pertaining to a particular person," a simple definition with which *amicus* MTLA fully agrees. This language exists to differentiate an injury to the person of the employee in question from other types of injuries, such as damage to clothing or other accouterments or intangible damages which might result from a work injury, but which are not *personal* injuries.

However, defendant proceeds to ignore its own definition once again, this time somehow transforming "of or pertaining to a particular person," the dictionary definition, into something quite different, requiring "medically identifiable damage to the body of the

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[5]Defendant's Brief, at 8.

[6]The same definition is available from the online version of Merriam-Webster Dictionary, at this URL: http://www.m-w.com/cgi-bin/dictionary?injury

employee."[7] *There is absolutely no support in either the statutory language or the definition defendant itself advances*. There simply is no good reason to inject all of this excess baggage into the simple word "personal."

Furthermore, it is not clear from its insistence upon a "medically identifiable damage to the body" standard how defendant would handle mental disability claims. Such claims may be based on psychological as well as physical trauma. *Carter v General Motors Corp*, 361 Mich 577; 106 NW2d 105 (1960); *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002). A claim involving purely psychological trauma would involve no damage to the body *at all*, medically identifiable or otherwise. Nevertheless, the Legislature has clearly demonstrated its intent that mental disability claims remain compensable, as demonstrated by MCL 418.301(2):

> "Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof."

This statutory language establishes not only that the Legislature retained the compensability of mental disability claims, but also that it preserved the compensability of such a condition not just caused but also aggravated, albeit "in a significant manner," by employment. Since precious few claims of preexisting mental conditions aggravated by employment would involve physical trauma or damage to the body, defendant's construction of "personal injury" would presumably reject such claims. This is obviously untenable, given the express language of the statute reprinted above.

Instead, "personal injury" should be construed simply to mean an act that damages or hurts a person. *This* is the plain meaning of "personal injury," the ultimate goal of statutory construction:

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[7]Defendant's Brief, at 26.

> "The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. If the plain language of the statute is clear, no further judicial interpretation is necessary. [*In re Worker's Compensation Lien (Ramsey v Kohl)*, 231 Mich App 556, 561; 591 NW2d 221 (1998) (internal citations omitted [by the Court]).]" *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Defendant's circuitous argument does not arrive at a meaning plain to anyone but it. It should be rejected accordingly. Its analysis of the case law is no more accurate.

Defendant is especially critical of this Court's decision in *Carter v General Motors Corp*, 361 Mich 577; 106 NW2d 105 (1960). However, its analysis in that regard begs the question. Defendant writes:

> "...in the case of *Carter, supra*, the Court said that there actually was medically identifiable damage separate from an existing injury or illness of the employee. Specifically, the Court observed that employee had a 'mental injury caused by ... employment.'"[8]

The Court actually found nothing more than the symptomatic aggravation of the claimant's paranoid schizophrenia, nowhere suggesting that his work experience in any way caused or added to that condition. Instead, work gave rise to a symptom of that condition, that being psychosis that was temporary in nature and compensable while extant. The phrase "mental injury caused by ... employment" in no way suggests "medically identifiable damage separate from an existing injury or illness of that employee," nor is there anything in the *Carter* decision which indicates that this is the case. This can only be accepted if one reads the word "injury" to encompass all this baggage, as defendant and no one else does.[9]

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[8]Defendant's Brief, at 29.

[9]Several panels of the Court of Appeals have disagreed with defendant, and characterized *Carter* as a "symptoms-only" case. See, *e.g.*, *Johnson* v *DePree Co*, 134 Mich App 709; 352 NW2d 303 (1984); *McDonald* v *Meijer, Inc*, 188 Mich App 210; 469 NW2d 27, lv den 439 Mich 898 (1991); *Siders* v *Gilco Inc*, 189 Mich App 670; 473 NW2d 802 (1991).

Defendant also suggests that, because *Carter* was applied in *Deziel v Difco Laboratories, Inc*, 403 Mich 1; 268 NW2d 1; reh den, 403 Mich 955 (1978), it must have been overruled when MCL 418.301(2) invalidated *Deziel*. However, this statute addressed only the "honest perception" test of *Deziel*, a test which left the issue of causation in the hands of the mentally disabled claimant: "Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof." This has absolutely nothing to do with the central holding of *Carter*. In fact, *Carter* continued to be cited by appellate courts, including this one, for years after the 1982 effective date of §301(2). See. *e.g.*, *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 741; 641 NW2d 567 (2002); *Peters v Michigan Bell Telephone Co,* 423 Mich 594, 609; 377 NW2d 774 (1985); *Siders* v *Gilco Inc* 189 Mich App 670, 673; 473 NW2d 802 (1991); *McDonald v Meijer, Inc*, 188 Mich App 210, 215; 469 NW2d 27, lv den 439 Mich 898 (1991). Defendant's attempt to discredit *Carter* by claiming it was statutorily overruled is absolutely untrue.

Defendant further attempts to impugn *Carter* by association. It offers a lengthy quote from *Fox v Detroit Plastic Molding,* 106 Mich App 749; 308 NW2d 633 (1981), having to do with the holding in *Carter* and its applicability to a "symptoms-only" case, prefacing that excerpt with the following statement: "...the first case which was decided by the Court of Appeals which cited *Carter, supra*, for the notion that the symptoms of an existing injury or illness were alone enough to constitute a *personal injury* was *Fox, supra*, which was promptly reversed by the Court."[10] While this statement may be true as far as it goes, it severely tests the bounds of intellectual honesty.

Fox may have been the first case to cite *Carter* for the proposition that a symptomatic aggravation of a preexisting condition can constitute a personal injury. It was definitely reversed by the Supreme Court. However, these two facts had *absolutely nothing* to do with each other.

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[10]Defendant's Brief, at 30.

Fox was not reversed because it followed *Carter*. Instead, it was reversed because it did *not* follow *Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979). The *Kostamo* Court declared that arteriosclerosis could not be aggravated by job stress:

> "Arteriosclerosis is an ordinary disease of life which is not caused by work or aggravated by the stress of work. However, stress that would not adversely affect a person who does not have arteriosclerosis may cause a person who has that disease to have a heart attack." *Kostamo supra*, at 116.

The Court of Appeals panel in *Fox* flatly refused to follow this finding:

> "The above excerpt certainly seems to indicate that the Supreme Court is taking judicial notice that arteriosclerosis is not aggravated by stress. However, we reject this view as will be detailed below. The quotation constitutes dicta which we are not bound to follow." *Fox, supra*, at 755.

After this Court reaffirmed its finding regarding arteriosclerosis in *Miklik v Michigan Special Machine Corp*, 415 Mich 364; 329 NW2d 713 (1982), it reversed *Fox*:

> "...in lieu of granting leave to appeal, we REVERSE the judgement of the Court of Appeals, 106 Mich App 749; 308 NW2d 633, and REMAND the case to the Workers' Compensation Appeal Board for further proceedings consistent with *Miklik v Michigan Special Machine Co*, 415 Mich ___; 329 NW2d 713 (1982)." *Fox v Detroit Plastic Molding*, 417 Mich 901; 330 NW2d 690 (1983).

This reversal had nothing whatever to do with the *Carter* doctrine or symptoms. Again, defendant has misled the Court.

However, *Fox* did point out a problem that has caused considerable confusion. It was clearly an unusual step for the *Kostamo* Court to simply declare, effectively as a matter of law, that arteriosclerosis was never aggravated by work stress. There was no citation to legal authority or medical evidence to support this pronouncement, which appears to preempt a determination more properly made by the finder of fact, based upon the medical record before him or her. As a result, the *Fox* Court correctly observed that "[t]he above

excerpt certainly seems to indicate that the Supreme Court is taking judicial notice that arteriosclerosis is not aggravated by stress." *Fox, supra*, at 755.

Once this seemingly factual proposition – that job stress can never aggravate arteriosclerosis – had been accorded the status of law, the analysis necessarily moved to a different plane. Something more had to be shown than merely the presence of arteriosclerosis and resulting symptoms, such as angina. This led to the further pronouncement in *Miklik v Michigan Special Machine Corp*, 415 Mich 364; 329 NW2d 713 (1982), that this "something more" would have to entail "heart damage," a step up from arteriosclerosis:

> "In all successful workers' compensation cases, the claimant must establish by a preponderance of the evidence both a personal injury and a relationship between the injury and the workplace. In heart cases, the first question is whether there is heart damage. The second is whether the heart damage can be linked by sufficient proof to the employment. Only if the first question is answered affirmatively need the second be asked." *Miklik, supra*, at 367.

The requirement of heart damage was not a rejection of the idea that a symptomatic aggravation can be compensable. It was instead the result of the *Kostamo* Court's finding that arteriosclerosis can never be aggravated by employment:

> "In assessing heart cases, the factfinder is controlled by the syllogistic analysis of the *Kostamo* majority: The Legislature has determined that ordinary diseases of life are not compensable. Arteriosclerosis is an ordinary disease of life. Therefore, arteriosclerosis is not compensable." *Miklik, supra*, at 368.

This syllogism is not even an accurate restatement of the *Kostamo* holding. In fact, the *Kostamo* Court acknowledged that, while ordinary diseases of life are not themselves compensable, the work-related aggravation or acceleration of those diseases *is* compensable:

> "Accordingly, compensation cannot be awarded because the worker may suffer heart damage which would be work-related if he continued to work. Unless the work has accelerated or aggravated the illness, disease or deterioration and, thus, contributed to it, or the work, coupled with the illness, disease or deterioration, in fact causes an injury, compensation is not

payable." *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 119; 274 NW2d 411 (1979).

The idea that heart damage was the only compensable showing that could be made in cardiac-based claims imposes a requirement of damage that has not been applied in any other area of workers' compensation law. It led to decisions in *Castillo v General Motors Corp*, 105 Mich App 776; 307 NW2d 417 (1981), and *Weinmann v General Motors Corp*, 152 Mich App 690; 394 NW2d 73; lv den, 426 Mich 860 (1986), both cited by defendant, which simply rejected the idea that the symptoms of arteriosclerosis could be aggravated by work and therefore required heart damage before an award could be granted.

It is from these claim-specific cases that defendants often try to impose a "damage" requirement on *all* types of workers' compensation claims. However, without the underlying finding from *Kostamo* that arteriosclerosis can never be aggravated by work, a further showing of heart damage would never have been required.

The determination of whether arteriosclerosis has been aggravated by employment would seem to be a matter more properly left for the finder of fact, particularly given the appellate courts' limited factual review in workers' compensation matters.[11] *Amicus* MTLA submits that it is time to reject the finding from *Kostamo* that such aggravation can never occur, and return that issue to the factual realm from which it arose and to which it belongs. If arteriosclerosis is proven to the satisfaction of the factfinder to have been aggravated by job stress, whether pathologically or symptomatically, any resulting limitation of the affected employee's wage-earning capacity might be compensable. Of course, the "significant manner" causation standard of of MCL 418.301(2) would still have to be met in such a case.

Such action would eliminate the distinct standard still applied in cardiac claims to date[12], and would also help reconcile conflicting principles emanating from *Kostamo*. This

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[11]*Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000).

[12]See, *e.g.*, *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993).

conflict is nowhere better illustrated than in the following quotation from *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57, 67; 523 NW2d 444 (1994):

> "Clearly there is a difference between pain resulting from 'illness or disease *not caused or aggravated*' by the work or working conditions, and pain *resulting* from a work-related injury. As indicated in *Kostamo*, worker's compensation benefits may not be awarded simply because a worker is unable by reason of pain to continue with the work if the cause of the pain is illness or disease not caused or aggravated by the work or working conditions. But contrariwise, if the WCAB finds that pain is caused or aggravated by a work-related injury, and the worker cannot by reason of pain resulting from the injury continue to work, the WCAB can find that the worker is disabled and award benefits."

This quotation supports *amicus* MTLA's position that pain resulting from an injury aggravated by work is compensable. However, it is also cited by defendant as supportive of the proposition that pain must result from a work-related condition before it may be compensable. This type of confusion is the result of unfortunate language in *Kostamo* taking away from its primary message. That message is, or should be, that pain on the job is compensable, but only if work has caused it. Any extraneous language, particularly language invading the province of the factfinder, should now be rejected by this Court as inappropriate.

CONCLUSION

Defendant's entire argument is premised upon the avoidance of one obvious fact -- an employee can suffer a work related "injury" that impairs his wage earning capacity, whether that injury aggravates a preexisting condition or merely causes the condition to become symptomatic. Either way, the employee cannot work, and the employment is the cause of that inability. As a result, either way, the claim should be compensable, although only as long as the effects of work endure.

RELIEF

WHEREFORE your *Amicus* MICHIGAN TRIAL LAWYERS ASSOCIATION respectfully requests that this Honorable Supreme Court make it clear that the work-related aggravation of the symptoms of a preexisting condition is just as compensable as the aggravation of the pathology of the condition, for as long as the aggravation continues. The opinion of the Workers' Compensation Appellate Commission should be affirmed accordingly.

Respectfully submitted,

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